Tang Tiew Yong & Ors v Wong Joon Hoon & Anor

HIGH COURT (SIBU) — CIVIL APPEAL NO 12–9 OF 2001
CLEMENT SKINNER J
28 MARCH 2002

Damages (Personal Injury or Death) *— Personal injuries — Loss of earnings — Living expenses to be deducted — Pre-trial loss of earnings awarded — Whether there was a distinction between pre-trial and post-trial loss of earnings — Loss of contribution to Employees' Provident Fund — Plaintiff aged 54 at the time of accident — Number of years' purchase or multiplier to be used — Civil Law Act 1956 s 28A(2)(c)(iii)*

The plaintiffs sued the defendant for personal injuries and damages suffered by the second plaintiff as a result of a collision between the motorcycle ridden by the second plaintiff and a lorry driven by the third defendant. The second plaintiff, aged 54 at the time of the accident, had been earning a monthly income of RM1,200. As a result of the accident, the second plaintiff suffered personal injuries and had been unable to work since. The trial judge found the defendants wholly liable for the accident and awarded the following damages: (a) medical expenses of RM6,262.74; (b) pre-trial loss of earnings of RM24,000 (calculated at RM1,200 over a period of 20 months); (c) loss of contributions to the employees' provident fund ('EPF') at RM2,880 (calculated at 12% × RM1,200 × 20); (d) general damages for pain and suffering and loss of amenities at RM36,000. This case came on for trial some 29 months after the accident and the trial judge allowed loss of pre-trial earnings of 20 months. This was an appeal by the defendants against the awards made by the trial judge for loss of pre-trial earnings and EPF contributions.

Held, allowing the appeal:

(1) The trial judge had erred in law when she made the award for loss of future earnings without addressing her mind to all the provisions of s 28A(2)(c)(iii) of the Civil Law Act 1956 ('the Act'). Had she done so, she would have found that the second plaintiff had admitted to incurring monthly expenses of RM200 for his food and RM30 for his petrol charges and the trial judge should have deducted a sum of RM230 from the monthly salary of RM1,200 to arrive at a loss of earnings of RM970 per month (see p 426E–G).

(2) With the introduction of s 28A(2) of the Act, there is no distinction between pre-trial and post-trial loss of earnings because loss of future earnings is to be calculated from the date of injury. Based on s 28A(2)(d)(ii) of the Act, the number of years' purchase or the multiplier to be used in the case where a person was between 31 and 54 years of age at the time when he was injured, would only be six months and not 20 months as awarded. Hence, the amount payable to the second plaintiff would be RM970 × 6 or RM5,620 (see pp 427A–B, 428H).

(3) Accordingly, the trial judge should have awarded loss of EPF contributions by using a multiplier of six months instead of 20 months. A sum of RM864 should be awarded for loss of EPF contributions (ie RM1,200 × 12% × 6) instead of RM2,880 (see pp 428I–429A).

[Bahasa Malaysia summary

Plaintif-plaintif telah mendakwa defendan bagi kecederaan diri dan ganti rugi yang dialami oleh plaintif kedua akibat satu pelanggaran antara motosikal yang ditunggang oleh plaintif kedua dan sebuah lori yang dipandu oleh defendan ketiga. Plaintif kedua yang berumur 54 tahun, pada waktu kemalangan tersebut memperoleh pendapatan bulanan sebanyak RM1,200. Akibat kemalangan tersebut, plaintif kedua telah mengalami kecederaan diri dan telah tidak dapat bekerja sejak itu. Hakim perbicaraan memutuskan defendan-defendan bertanggungan sepenuhnya bagi kemalangan tersebut dan memberikan ganti rugi yang berikut: (a) perbelanjaan perubatan sebanyak RM6,262.74; (b) kehilangan pendapatan pra- perbicaraan sebanyak RM24,000 (yang dikira pada kadar RM1,200 selama jangka tempoh selama 20 bulan); (c) kehilangan sumbangan kepada kumpulan wang simpanan pekerja ('KWSP) pada jumlah RM2,880 (yang dihitung pada kadar 12% RM1,200 % 20); (d) ganti rugi bagi kesakitan dan kesusahan serta kehilangan kemudahan pada kadar sebanyak RM36,000. Kes ini tiba untuk perbicaraan lebih kurang 29 bulan selepas kemalangan tersebut dan hakim perbicaraan membenarkan kehilangan pendapatan pra-perbicaraan 20 bulan. Ini adalah satu rayuan oleh defendan-defendan terhadap award yang dibuat hakim perbicaraan kerana kehilangan pendapatan pra-perbicaraan dan sumbangan EPF.

Diputuskan, membenarkan rayuan:

(1) Hakim perbicaraan telah tersalah pertimbangan di sisi undang-undang apabila beliau membuat award bagi kehilangan pendapatan masa depan tanpa memikirkan kesemua peruntukan-peruntukan s 28A(2)(c)(iii) Akta Undang-Undang Sivil 1956 ('Akta tersebut'). Sekiranya beliau melakukan sedemikian, beliau tentunya telah memutuskan bahawa plaintif kedua telah mengakui mengalami perbelanjaan bulanan sebanyak RM200 untuk makanan beliau dan RM30 untuk bayaran petrol beliau dan hakim perbicaraan sepatutnya telah memotong jumlah sebanyak RM230 daripada pendapatan bulanan sebanyak RM1,200 untuk mencapai kehilangan pendapatan sebanyak RM970 sebulan (lihat ms 426E–G).

(2) Dengan pengenalan s 28A(2) Akta tersebut, tidak terdapat perbezaan antara kehilangan pendapatan pra-perbicaraan dan selepas perbicaraan kerana kehilangan pendapatan masa depan

haruslah dikira daripada tarikh kecederaan. Berdasarkan s 28A(2)(d)(ii) Akta tersebut, bilangan tahun belian atau pendarab yang harus digunakan di dalam kes di mana seseorang adalah antara umur 31 dan 54 pada waktu beliau cedera, akan hanya merupakan enam bulan atau bukan 20 bulan seperti mana yang telah diawardkan. Oleh itu, jumlah yang kena dibayar kepada plaintif kedua adalah sebanyak RM970 × 6 atau RM5,620 (lihat ms 427A–B, 428H).

(3) Sehubungan itu, hakim perbicaraan sepatutnya telah mengawardkan kehilangan sumbangan KWSP dengan menggunakan pendarab enam bulan dan bukannya 20 bulan. Jumlah sebanyak RM864 haruslah diawardkan bagi kehilangan sumbangan EPF (iaitu RM1,200 × 12% × 6) dan bukannya RM2,880 (lihat ms 428I–429A).]

Notes

For cases on loss of earnings, see 6 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 593–595.

Cases referred to

Chang Chong Foo & Anor v Shivanathan [1992] 2 MLJ 473 (folld)
Chu Kim Sing & Anor v Abdul Razak bin Amin [1999] 6 MLJ 433 (not folld)
Dirkje Peiternella Halma v Mohd Noor bin Baharom & Ors [1990] 3 MLJ 103 (folld)
Lee Tai Kau v Rajanderan Manickam [1995] 4 MLJ 163 (not folld)
Murtadza bin Mohamad Hassan v Chong Swee Pian [1980] 1 MLJ 216 (refd)
N Vijaya Kumar s/o Narayanasamy v Voon Chen Lim [1989] 3 MLJ 255 (not folld)
Nagarajan Veerapan v Ananthan a/l Parama Sivam & Anor [1989] 2 CLJ 1243 (refd)
Tan bin Hairuddin & Anor v Bayeh a/l Belalat [1990] 2 CLJ 773 (refd)

Legislation referred to

Civil Law Act 1956 ss 28A(2)(c)(ii), 28(2)(d)(ii)

Appeal from: Civil Suit No SB–53–09 of 1999 (Sessions Court, Sibu)

Frank Tang (*Tang & Partners*) for the appellants.
Robert Lau (*Stephen Robert & Wong*) for the respondent.

Clement Skinner J: This is an appeal against the decision of the learned sessions court judge given on 16 May 2001 in respect of a claim for personal injuries and damages suffered as a result of a road accident. The brief facts of the case are these. On 23 July 1998 the second respondent (who was the

second plaintiff in the court below) was riding a motorcycle (belonging to the first respondent) along Jalan Upper Lanang heading in the direction of Sibu town when a collision occurred between the second respondent's motor-cycle and a lorry driven by the third appellant (and owned by the first and second appellants), in front of a construction site known as Romany Development.

As a result of the accident, the second respondent, who was then 54 years of age and working as a storekeeper earning RM1,200 per month, suffered personal injuries and was hospitalized immediately after the accident. Even after his discharge on 26 July 1998, the second respondent was unable to work until the date of trial.

After a full trial, the learned sessions court judge found that the accident had been solely caused by the negligence of the third appellant and accordingly entered judgment against the appellants. Damages were then assessed and awarded to the second respondent under several heads of claim, not all of which are relevant to this appeal. Thus, the learned sessions court judge made awards in respect of:

(1) medical expenses which she assessed at RM9,394.12 but awarded a sum of RM6,262.74 being two-thirds of the sum assessed;

(2) loss of pre-trial earnings which she assessed at RM24,000 being RM1,200 × 20 months;

(3) loss of EPF contributions at RM2,880 being the employer's contribution of 12% of the second respondent's income of RM1,200 per month over 20 months;

(4) general damages for pain and suffering and loss of amenities at RM36,000.

The appellants, being dissatisfied with the awards made under the above four heads of claim, have brought this appeal. They do not appeal against the learned sessions court judge's finding on liability.

At the hearing of this appeal, the appellants did not pursue their appeal against the awards made for medical expenses and general damages for pain and suffering. This judgment therefore relates to the appellants' appeal against the awards made for loss of pre-trial earnings and EPF contributions only. I now consider each of these in turn.

Loss of pre-trial earnings

It is the case of the appellants that the learned sessions court judge had erred in law and in fact when she failed to consider s 28A(2)(c)(iii) and s 28(2)(d)(ii) of the Civil Law Act 1956 in awarding RM24,000 to the second respondent for loss of pre-trial earnings.

To appreciate the appellants' complaint, it is necessary to recapitulate certain undisputed facts. When the accident occurred on 23 July 1998, the second respondent was 54 years old and employed as a store-keeper earning a monthly salary of RM1,2000. By the time the case came on for trial, 29 months had passed by. In making her award, the learned sessions court

judge allowed loss of pre-trial earnings over 20 months (having knocked-off 9 months) as she held that the second respondent could have secured a job after 20 months had he attempted to do so. Thus, the learned sessions court judge awarded loss of pre-trial earnings as follows: RM1,200 × 20 months = RM24,000.

It is the contention of the appellants that in doing so, the learned sessions court judge had failed to consider s 28A(2)(c)(iii) and s 28A(2)(d)(ii) of the Civil Law Act 1956 which subsections not only set out certain matters which a court must take into account when awarding damages for loss of future earnings, but also the formula for calculating the number of years' purchase when assessing loss of future earnings of a person between the ages of 31–54 at the time when he was injured.

For convenience, I set out the above subsections:

> 28A Damages in respect of personal injury
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> (2) In assessing damages under this section —
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> (a) ...
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> (b) ...
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> (c) in awarding damages for loss of future earnings the Court shall take into account —
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> (i) that in the case of a plaintiff who has attained the age of fifty five years or above at the time when he was injured, no damages for such loss shall be awarded; and in any other case, damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury and was receiving earnings by his own labour or other gainful activity before he was injured;
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> (ii) only the amount relating to his earnings as aforesaid at the time when he was injured and the Court shall not take into account any prospect of the earnings as aforesaid being increased at some time in the future;
>
> (iii) any diminution of any such amount as aforesaid by such sum as is proved or admitted to be the living expenses of the plaintiff at the time when he was injured;
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> (d) in assessing damages for loss of future earnings the Court shall take into account that —
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> (i) in the case of a person who was of the age of thirty years or below at the time when he was injured, the number of years' purchase shall be 16; and
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> (ii) in the case of any other person who was of the age range extending between thirty one years and fifty four years at the time when he was injured, the number of years' purchase shall be calculated by using the figure 55, minus the age of the person at the time when he was injured and dividing the remainder by the figure 2.

It will be seen that by sub-s 2(c)(iii) of s 28A, the court must, when awarding damages for loss of future earnings, take into account the amount by which the earnings of a plaintiff is diminished by his living expenses which he either admits to or is proved that he incurred.

A It is the complaint of the appellants that the learned sessions court judge had not made any deductions for his living expenses from the second respondent's monthly earnings of RM1,200 even though he had admitted during his cross-examination that he incurred some RM400 to RM500 for his own expenses each month. According to the appellants, the second respondent admitted that he spent RM30 per month on petrol, RM200 per B month on food and cigarettes and RM200 per month on car instalments; thus making a total of RM430 per month which he incurred for living expenses which should have been deducted from his monthly earnings.

The second respondent's answer to the appellants' complaint is that living expenses should not be deducted from any award for loss of future C earnings as it would be absurd to do so. Counsel for the second respondent argued that as the second respondent is still living and must, therefore, incur living expenses in order to live, any deduction would amount to a double deduction which should not be allowed.

I regret that the law as well as case authority is against the second D respondent on this point.

The point was taken and decided by the then Supreme Court in *Chang Chong Foo & Anor v Shivanathan* [1992] 2 MLJ 473, a decision which is binding on this court. That case also arose out of a road accident between a motor-cycle driven by the plaintiff/respondent and a car driven by the defendant/appellant. The learned trial judge found the defendant/appellant E 100% to blame for the accident. When giving his evidence, the plaintiff/respondent said that he went to work by motorcycle and spent RM60 per month on petrol and he also took his meals at work which cost him RM5 per day. In awarding the plaintiff/respondent damages for loss of future earnings, the learned trial judge made an award without making any deductions for the above two items under s 28A(2)(c)(iii) of the Act. F On appeal against that part of the decision, it was argued for the defendant/appellant that the sum of RM60 per month (for petrol) and RM5 per day (for meals) being living expenses coming within the meaning of s 28A(2)(c)(iii) should have been deducted from his monthly earnings, while the plaintiff/respondent contended that living expenses can only be G deducted if a person is dead; because if he is alive, he needs living expenses in order to live. The contention of the plaintiff/respondent was rejected by the Supreme Court which held that s 28A is clearly intended for a living plaintiff and that living expenses, if proved or admitted, must be deducted when an award is made for loss of future earnings. This is what Harun Hashim SCJ said in delivering the decision of the court at p 479:

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> The plaintiff did give evidence and he said that:
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> (a) He went to work by motor cycle and spent $60 per month on petrol.
>
> (b) His meals at work cost him $5 per day.
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> Mr Nathan (for appellant) says both these items are living expenses under (iii). Mr Guna says living expenses can only be deducted if a person is dead, I if alive he needs living expenses in order to live. We cannot accept Mr Gunasegaran's argument, because s 28A is clearly intended for a living plaintiff and therefore s 28A(2)(c)(iii) applies to the facts of this case.

What then is meant by *living expenses* in (iii)? It is trite law that words in a statute must be given their ordinary meaning. The *Shorter Oxford English Dictionary* defines 'living' as: 'The action, process, or method of gaining one's livelihood. The means of living; livelihood, maintenance.' 'Expenses' means money out of pocket'.

In fatal accident cases in respect of a dependency claim, the deceased's own expenses have to be deducted: see *Amar Singh v Chin Kiew* ([1960] MLJ 77) This was the position at common law. It made sense because the deceased before his death could not have contributed the whole of his earnings towards the maintenance of his wife and children and that at least some part of his earnings must have been devoted to his own maintenance. This principle is now reflected in s 7(3)(iv)(c) which came into force on 1 October 1984 and states:

> 'In assessing the loss of earnings in respect of any period after the death of a person where such earnings provide for or contribute to the damages under this section the Court shall: take into account any diminution of any such amount as aforesaid by such sums as is proved or admitted to be the living expenses of the person deceased at the time of his death.'

It will be seen that the same language is used in both s 7(3)(iv)(c) and s 28A(2)(c)(iii). It follows that the legislature intended that the same principle be applied in both cases, that is to say, in respect of a dependency claim for loss of earnings arising out of a fatal accident and in respect of a claim for loss of future earnings for personal injury. We are accordingly of the view that the term 'living expenses' in s 7 and s 28A bear the same meaning.

Applying what was stated by the Supreme Court in *Chang Choong Foo* to the facts of our case, it is my view that the learned sessions court judge had erred in law when she made the award for loss of future earnings without addressing her mind at all to the provisions of s 28A(2)(c)(iii) of the Act. Had she done so, she would have found that the second respondent had admitted to incurring monthly expenses of RM200 for his food and RM30 for petrol charges. Contrary to the submissions of counsel for the appellants, the second respondent did not admit to paying monthly instalments of RM200 for a car. His evidence was that the car was owned by his son and he helped to pay the instalments when his son could not do so. There was no evidence or admission that he did so monthly. In the result, the learned sessions court judge should have deducted RM230 (being RM200 for food and RM30 for petrol) from the monthly salary of RM1,200 earned by the second respondent, thus giving him a loss of earnings of RM970 per month.

Having determined what the loss in earnings suffered by the second respondent in each month amounted to, the next question that must be determined is, what is the multiplier or number of years' purchase when assessing the damages for loss of future earnings to the second respondent who was 54 years old when he met with the accident on 23 July 1998?

It will be recalled that the learned sessions court judge awarded the second respondent 'pre-trial loss of earnings' over 20 months. It is the complaint of the appellants that the learned sessions court judge had erred in law when she did so as she failed to direct her mind to the provisions of

s 28A(2)(d)(ii) of the Act which sets out the formula for calculating the number of years' purchase (or multiplier) where a person is between 31–54 years of age at the time when he is injured. It is the contention of the appellants that if the formula stated in s 28A(2)(d)(ii) is followed, then the number of years' purchase or the multiplier would only be six months, ie 55–54 ÷ 2 = ½, or six months, and not 20 months as awarded by the learned sessions court judge. It is also the contention of the appellants that since 1 October 1984, when the Civil Law Act 1956 was amended and s 28A(2) introduced into the Act, there is no longer any distinction between pre-trial and post-trial loss of earnings and that loss of future earnings runs from the date of the injury.

Counsel for the second respondent took an opposite view. He submitted that the learned sessions court judge was correct in awarding the second respondent pre-trial loss of earnings of 20 months as s 28A(2)(c)(d) of the Act only applies to loss of future earnings ie to post-trial loss of earnings and not pre-trial loss of earnings as the latter does not form part of loss of future earnings since it has been looked upon as special damages. Counsel for the second respondent also said that it is the practice of the courts to deduct the number of years of pre-trial loss of earnings from the multiplier under s 28A(2)(d).

In my view, the point under discussion has been decided in *Dirkje Peiternella Halma v Mohd Noor bin Baharom & Ors* [1990] 3 MLJ 103. In that case, this is what Gunn Chit Tuan SCJ had to say about the matter in delivering the judgment of the Supreme Court at p 104:

> During the hearing before us Mr Gurbachan Singh, leading counsel for the appellant, agreed with us that since the amendment of the Civil Law Act 1984 on 1 October 1984 there is no distinction between pre-trial and post-trial loss of earnings. He agreed that as from that date, loss of future earnings should be awarded in relation to the time when the plaintiff was injured, that is, the date of accident or injury and a proper award for loss of future earnings made under s 28A(2)(c) of the Civil Law Act 1956.

In *Tan bin Hairuddin & Anor v Bayeh a/l Belalat* [1990] 2 CLJ 773, Abdul Malek J (as he then was) followed the decision in *Dirkje*'s case and set aside an award for pre-trial loss of future earnings made by the sessions court judge to a plaintiff who was 59 years old on the date of accident, on the grounds that the computation of loss of future earnings should commence from the date of injury.

While I agree that prior to the introduction of s 28A(2) into the Civil Law Act 1956 on 1 October 1984, the court had a discretion to, and, indeed did, award pre-trial loss of earnings as special damages (see *Murtadza bin Mohamad Hassan v Chong Swee Pian* [1980] 1 MLJ 216) calculated from the date of accident to the date of trial, the position changed after 1 October 1984 because, as Gunn Chit Tuan SCJ put in *Dirkje*'s case, there is no distinction between pre-trial and post-trial loss of earnings as loss of future earnings should be awarded in relation to the time when the plaintiff was injured; or put another way, computation of loss of future earnings should commence from the date of injury.

In this regard, I would also refer to *Nagarajan Veerappan v Ananthan all Parama Sivam & Anor* [1989] 2 CLJ 1243 where KC Vohrah J (as he then was) took the view that after 1 October 1984, pre-trial loss of earnings no longer forms a head of claim. This is what the learned judge said (at p 1246):

> Pre-trial loss of earnings for claims arising under the pre-amendment law were and may be claimed as special damages (see *Murtadza bin Mohamed Hassan v Chong Swee Pian* [1980] 1 MLJ 215) calculated from the date of accident to the date of trial.
>
> The provisions of s 28A(2), made in 1984, make no mention of this head of damages; and all relevant provisions for the purpose of calculating loss of future earnings refer to the age at the date of accident and not to the age at the date of trial as the figure. It seems to me therefore that there can be no separate head for pre-trial loss.

In a latter part of his judgment, when dealing with the question of whether the 'years' purchase' or multiplier under s 28A(2)(d)(ii) should be applied directly to the multiplicand or be applied indirectly to it through an annuity table, KC Vohrah J said (at p 1249):

> In fact, in not allowing for pre-trial loss to be claimed as an item of special damages (as was explained earlier in the judgment), the damages allowable in respect of pre-amendment claims become subsumed in the damages that become due on the statutory formula, leaving the defendant less damages than he would have got for pre-amendment claims.

I respectfully concur with what was said by his Lordship.

Counsel for the second respondent referred me to three cases in which the High Court has awarded pre-trial loss of future earnings. They were *N Vijaya Kumar s/o Narayanasamy v Voon Chen Lim* [1989] 3 MLJ 255; *Chu Kim Sing & Anor v Abdul Razak bin Amin* [1999] 6 MLJ 433 and *Lee Tai Kau v Rajanderan Manickam* [1995] 4 MLJ 163. In view of the clear pronouncement in *Dirkje*'s case about there no longer being any distinction between pre-trial and post-trial loss of future earnings and from what date loss of future earnings are computed, I respectfully decline to follow those cases.

Even if I am wrong in what I say about pre-trial loss of future earnings after 1 October 1984, as the second respondent was 54 years old at the time when he was injured, the learned sessions court judge should have assessed damages for loss of future earnings in accordance with the statutory formula in s 28A(2)(d)(ii) which would have given a multiplier of six months and not 20 months. Thus, the amount payable to the second respondent would be: RM970 × 6 = RM5,820.

Loss of EPF contributions

It follows from what I have said above that the learned sessions court judge should have awarded loss of EPF contributions using a multiplier of six months instead of 20 months.

A In the result, I allow the appeal against the award under the above two heads of damages and set aside the awards made by the learned sessions court judge. In their place, I award a sum of RM5,820 for loss of future earnings and RM864 for loss of EPF contributions ie RM1,200 × 12% × 6 = RM864.

B *Appeal allowed.*

Reported by Lim Lee Na

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